

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JIM FRIEND)	
Claimant)	
)	
VS.)	
)	
THAYER AEROSPACE CONSOLIDATED LLC)	
Respondent)	Docket No. 1,027,859
)	
AND)	
)	
LIBERTY INSURANCE GROUP)	
Insurance Carrier)	

ORDER

Respondent and its insurance carrier requested review of the May 4, 2007 Award by Administrative Law Judge (ALJ) Thomas Klein. The Board heard oral argument on August 14, 2007.

APPEARANCES

Gary K. Jones, of Wichita, Kansas, appeared for the claimant. Gregory D. Worth, of Roeland Park, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. In addition, the parties agreed the ALJ's Award failed to give appropriate credit for the 9 weeks of temporary total disability (TTD) respondent overpaid and that this should be reflected in the final computations.

ISSUES

The ALJ granted claimant an 8 percent functional impairment, which is an average of the impairment opinions offered by Drs. Capper and Murati, and an 80 percent

permanent partial general (work) disability, which is based upon a 100 percent wage loss and a 61 percent task loss.

The respondent requests review of this decision alleging a number of errors. First, respondent contends claimant's injury is more appropriately an occupational disease rather than an accidental injury. As such, the respondent argues the evidence fails to establish that claimant has sustained a permanent physical impairment or an impairment to his ability to earn wages as a result of his workplace injury. Thus, he is not entitled to anything beyond the benefits he has received to date.

Alternatively, if claimant's injury constitutes an accidental injury, respondent maintains his Award should be limited to a functional impairment as claimant retains the ability to earn a comparable wage and has failed to make a good faith effort to find appropriate employment. Independent of that argument, respondent also maintains the claimant's functional impairment should be limited to two separate functional impairments consistent with the principles set forth in *Casco*¹, thereby foreclosing any work disability claim.

Claimant contends the ALJ's Award should be affirmed in all respects. Claimant maintains that respondent specifically stipulated that this was a compensable accidental injury at the pre-hearing settlement conference. Thus, the ALJ's conclusion that claimant sustained a 61 percent task loss and a 100 percent wage loss were all appropriate and the resulting 80 percent permanent partial general (work) disability should be upheld. To the extent the Board finds that *Casco* applies to claimant's injury thereby limiting his recovery to 2 separate scheduled injuries, then claimant requests leave to withdraw his stipulation that claimant's injury constitutes an accidental injury in favor of a claim based upon an occupational injury, K.S.A. 44-5a01, et seq.

Claimant alternatively argues that if this is viewed as an occupational disease, then the appropriate measure of claimant's loss of earning capacity should be based on his pre-injury capacity to earn in excess of \$800 per week with his present actual earnings of zero, leaving him with a 100 percent wage loss.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

There is no dispute that claimant, who was a maintenance worker for respondent, contracted contact dermatitis while working with a contaminated substance in the normal

¹ *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 154 P.3d 494, reh. denied (2007).

course of his job. He now suffers from eczema and hyperhydrosis primarily on his hands although at times he has had exposures elsewhere. This condition emerged following repeated exposures to various chemicals involved in his job, most particularly muriatic acid. As the condition worsened, claimant was sent to Dr. Dobyns, who initially diagnosed his condition. Claimant attempted to wear gloves in order to avoid the exposure while working, but each time he would work, his symptoms would reemerge.

Claimant was eventually sent to a dermatologist, Dr. Capper, who prescribed Prednisone and other topical ointments, items he will need on an ongoing basis. He was also told to avoid chemical exposure, particularly petroleum based products and was released to return to work in June 2006. Respondent continued to view claimant as employed following his release, but it is undisputed that respondent was unable to accommodate this restriction. Petroleum based products are prevalent in claimant's job as a maintenance worker and those substances cause him to break out upon exposure. Thus, he is particularly vulnerable in that position to further exposures and injury.

Since his release from active treatment, and after respondent made it clear no job was forthcoming, claimant has been searching for work. He has, so far, been unsuccessful and remains unemployed.

At the statutorily required pre-hearing settlement conference, respondent stipulated that claimant had sustained an accidental injury arising out of and in the course of his employment. Although respondent's counsel maintains that "occupational disease was always an issue" in this claim, there is nothing contained on the pre-hearing settlement conference sheet that would indicate that to be the case. And that document was apparently completed by the parties and signed by respondent's counsel at the pre-hearing conference.

Then at the Regular Hearing those stipulations were repeated again and adopted by respondent's counsel.² There is no indication in the transcript of that hearing that respondent was asserting claimant's contact dermatitis was the result of an occupational disease rather than an accidental injury. And up until this appeal was filed and oral arguments were held, there has never been a request by respondent for leave to withdraw that stipulation so that this claim could be litigated under the alternative theory.³ Indeed, claimant denies that there was any understanding between the parties that his claim was "always" tried with the prospect of a finding that it was due to an occupational disease.

² R.H. Trans. at 3-6.

³ At oral arguments on this appeal, claimant's counsel requested leave to withdraw his stipulation that the claimant's contact dermatitis was the result of an accidental injury. He made this request in light of the implications of *Casco* and the prospect of recovering only two separate schedule impairments rather than a loss of earning capacity which would arguably exceed any such separately scheduled functional impairments.

Before this case was submitted to and decided by the ALJ, the Kansas Supreme Court in *Casco* addressed the method of computing an injured employee's recovery in parallel injury claims. While bilateral upper extremity claims were routinely computed as a whole body injury (and work disability under K.S.A. 44-510e(a) was then a possibility), the *Casco* Court has dictated that scheduled injuries are now the rule.⁴ And unless the claimant can establish a permanent total disability resulted from the parallel injury, then any recovery is limited to separate scheduled impairments based upon K.S.A. 44-510d.

Two physicians have testified to claimant's functional impairment. Dr. Capper, the dermatologist who was treating claimant, assigned him a 0-9 percent permanent partial *whole body* impairment for the eczema. Although the basis for this impairment assessment is unknown, Dr. Capper testified that in rating claimant's impairment he used some sort of chart but he was unable to produce that chart during his deposition. When asked, he confirmed that he did not use the A.M.A. *Guides*, 4th edition⁵ as is required by K.S.A. 44-510e(a). Dr. Capper further testified that claimant had no physical change to his body. Rather, he would suffer periodic flare-ups of his dermatitis when exposed to the offending substances and should avoid such contact.

In contrast, Dr. Pedro Murati examined and rated claimant at the request of his lawyer and assigned a 10 percent permanent partial impairment to the *whole body* for both eczema and hyperhydrosis to claimant's hands secondary to chemical exposure.

Unfortunately, neither of these physicians offered an impairment opinion *relative to each hand*. Rather, both physicians rendered an opinion based upon the whole body. This omission could not logically have been foreseen given the longstanding case law that predated *Casco*. Nonetheless, the law now compels a finding of two separate scheduled injuries and there is no evidence within the record that would assist this finder of fact in deciding this issue. More to the point, it is unclear whether one hand is more affected than the other. To use the whole body impairments provided by the physicians and try to convert them to separate hand impairments would require the finder of fact to engage in speculation, something the Board is unwilling to do. Thus, in the interest of justice, the Board has determined that the ALJ's Award should be set aside and this matter remanded to the ALJ for further proceedings on this issue alone.⁶ The parties need to supplement the record with evidence bearing upon the separately scheduled impairments to claimant's hands relative to the contact dermatitis of the hands. The Board also denies respondent's request to withdraw the stipulation as to an accidental injury arising out and in the course of employment.

⁴ *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 154 P.3d 494, *reh. denied* (2007).

⁵ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment*, (4th ed.). All references are to the 4th ed. of the *Guides* unless otherwise noted.

⁶ *Neal v. Hy-Vee, Inc.*, Docket No. 217,766, 2000 WL 623072 (WCAB Apr. 19, 2000).

In making this finding, the Board specifically rejects claimant's argument that because his face is periodically affected by this chemical exposure, that he is exempt from the implications of *Casco*. Claimant's own expert, Dr. Murati, based his permanent impairment opinion on claimant's hands. There is no indication in his report or his deposition testimony that any other portion of claimant's body is permanently involved.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Thomas Klein dated May 4, 2007, is set aside and remanded to the ALJ for further proceedings consistent with the findings herein.

IT IS SO ORDERED.

Dated this _____ day of September, 2007.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

CONCURRING AND DISSENTING OPINION

This case was litigated as a personal injury by accident and not as an occupational disease. Unless the award is for only the percent of functional impairment, the method for determining permanent disability compensation is different for an accidental injury than it is for an occupational disease. This difference in disability compensation, however, was not as significant before *Casco* as it has become under the current law. The common understanding before *Casco* was that permanent injuries to parallel extremities could be compensated as general body disabilities and therefore an award of work disability was possible. Since *Casco* that is no longer the case. Accordingly, the undersigned Board Members agree that the unforeseen change in circumstances requires a remand, in the

interest of justice. Upon remand, the ALJ should reopen the record to allow the parties to present additional evidence on the nature and extent of the claimant's disability including the question of whether the claimant suffered an injury by accident or an occupational disease. The majority, however, seems to have prejudged what that evidence will be and limited what additional evidence may be presented. On the question of the nature and extent of claimant's injury, the majority limits the evidence to "separately scheduled impairments to the hands" and "specifically rejects claimant's argument that because his face is periodically affected by this chemical exposure, that he is exempt from the implications of *Casco*. Claimant's own expert, Dr. Murati, based his permanent impairment opinion on claimant's hands. There is no indication in his report or his deposition testimony that any other portion of claimant's body is permanently involved."

The reason Dr. Murati was not asked whether claimant's condition is systemic or if it involves portions of his body other than his hands may have been because before *Casco* these questions were not considered necessary in order to prove a work disability. For the same reasons that the majority has decided that "in the interest of justice" this case should be remanded for further proceedings, we would not limit the evidence on the nature and extent of injury nor prejudice what that evidence may show.

BOARD MEMBER

BOARD MEMBER

c: Gary K. Jones, Attorney for Claimant
Gregory D. Worth, Attorney for Respondent and its Insurance Carrier
Thomas Klein, Administrative Law Judge